

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

GEOFFREY LEE BROWN,

Defendant-Appellant/Cross-  
Appellee.

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UNPUBLISHED

October 2, 2007

No. 264247

Macomb Circuit Court

LC No. 2005-000413-FH

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

I. Introduction

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a),<sup>1</sup> and sentenced to concurrent prison terms of 40 to 180 months each. After defendant filed this appeal, this Court granted defendant's motion to remand for a *Ginther*<sup>2</sup> hearing and decision on defendant's claim that he was denied the effective assistance of counsel. During the *Ginther* hearing, the trial court granted defendant's motion to certify that it would order a new trial based on a *Brady*<sup>3</sup> violation. After two additional remands by this Court, the second of which specified that the case was being remanded to vest the trial court with jurisdiction to substantively decide defendant's motion for a new trial, the trial court entered an order granting defendant's motion for a new trial based on a *Brady* violation. Pursuant to MCR 7.208(B)(5)(b), the prosecutor thereafter filed a cross appeal to challenge the trial court's decision granting a new trial. We reverse the trial court's order granting defendant a new trial and affirm his convictions and sentences.<sup>4</sup>

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<sup>1</sup> Proof of sexual contact with a person under 13 years of age is sufficient to establish CSC II. MCL 750.520c(1)(a).

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>3</sup> *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

<sup>4</sup> Defendant's remand request in his original brief on appeal, which was filed before this Court remanded the case for a *Ginther* hearing, is now moot, given that defendant was granted the remand relief he requested and he was afforded an opportunity to file a supplemental brief with  
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## II. Trial Issues

We first turn to defendant's claim that the prosecutor's opening statement was improper and denied him a fair trial. Because defendant did not object to the prosecutor's opening statement at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The purpose of the opening statement is to allow the prosecutor to "make a full and a fair statement of the prosecutor's case and the facts that the prosecutor intends to prove." MCR 6.414(C). We must examine the prosecutor's remarks in context to determine if defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

There is no merit to defendant's argument that the prosecutor improperly told the jury that "there are no videos", even in light of the subsequent discovery of the victim's videotaped Care House interview. Viewed in context, it is apparent that the prosecutor was referring to the fact that there were no videos depicting the alleged sexual abuse, and that the charged conduct instead would have to be established by the victim's testimony. That was a true statement, and therefore there was no plain error. Further, contrary to what defendant argues on appeal, the record discloses that the prosecutor disclosed to the jury that the victim was eight years old at the time of trial. Also, there was no plain error in the prosecutor's statement that the victim need not resist. Examined in context, the prosecutor was relating the facts of the case to the applicable law on which she expected the trial court to instruct the jury at the close of proofs, and which the jury was later instructed.

There was also no plain error in the prosecutor's remarks regarding the victim's anticipated testimony or her credibility. Although it is improper for a prosecutor to appeal to a jury's sympathy during opening statement, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), the prosecutor's remarks here were directed at the victim's testimony that she intended to offer to establish the charges. They were not an appeal to sympathy. Further, the prosecutor's comments regarding credibility were not improper. The prosecutor identified some of the factors that might affect the credibility of a witness, and her statements were made in the context of accurately informing the jury that it was up to it to decide questions of credibility. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Even if we were to assume that some of the prosecutor's statements could be construed as improper, we would hold that defendant's substantial rights were not affected because of the trial court's instructions. Specifically, the trial court instructed the jury that the lawyers' statements are not evidence, that "[y]ou must not let sympathy or prejudice influence your decision," and

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this Court to present issues arising in the proceedings on remand. See *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997) ("[a]n issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief").

that the jury must decide the facts of the case. The trial court also provided factors to the jury to consider in assessing the credibility of witnesses. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

### III. New Trial

We now turn to the prosecutor’s argument that the trial court erred in granting defendant a new trial<sup>5</sup> based on a *Brady* violation.

The issue first arose during a *Ginther* hearing, where during the course of the hearing it was discovered that a videotape of an interview of the victim, taken at Care House soon after the incidents occurred, actually existed. The trial court’s initial conclusion was that a new trial was warranted on the basis that the tape was critical to the preparation of a defense:

*My finding is it is a critical piece of evidence for any counsel to review and it is not the ineffective assistance but the ability to be effective having all the materials made available to the trial lawyer to make a determinations [sic], “Do I need an expert for analysis on the testimony? Do I need an expert to contradict the procedures and protocols associated with the interview process? Are there inconsistencies?” Those are things that are paramount to a lawyer’s preparation. And of obvious need to that attorney are materials, nothing more critical than the first interview. [Emphasis added.]*

The trial court’s written order elaborated somewhat on its reasons for certifying that it would grant a new trial:

*This matter having come before the Court on Remand from the Court of Appeals for purposes of a Ginther Hearing [sic] and said hearing having commenced and it appearing in the course of the testimony and presentation of evidence that defendant filed a formal request for discovery pursuant to MCR 6.201 et. seq. and that further it appearing that a critical piece of requested discovery and required by court rule [sic]; to wit: a videotape interview of the complainant, the court finds that defendant’s right to discovery was violated. The omission of this evidence was prejudicial to the defendant and significantly impaired his ability to confront the evidence against him. The Court further finds that as a result, defendant was deprived of critical evidence, denied due process and that the trial in this matter was fundamentally unfair. Further, the court determines that the videotape of the complainant’s interview, if available to defense counsel would have had a substantial impact on defense counsel’s ability to investigate, prepare and present evidence at trial. [Emphasis added.]*

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<sup>5</sup> Because the prosecutor was permitted to file a cross appeal pursuant to MCR 7.208(B)(5)(b), there is no basis to defendant’s jurisdictional challenge to this Court’s authority to review the trial court’s decision to grant a new trial.

After the trial court issued this order, a motion to enforce the lower court's order was filed with, and granted by, this Court. As a result, the matter was remanded to allow defendant to file a motion for a new trial. In addressing defendant's motion for a new trial based on the alleged *Brady* violation, the trial court indicted that presenting the videotape would not be "outcome determinative" for "if anything, [the videotape] supports the young lady's allegation, and it shows that it was not a recent fabrication." Nevertheless, the trial court concluded that, although it was not certain how the videotape would be used, "I can't imagine going to trial without having it." The trial court ultimately concluded that the victim's statements on the videotape about sleeping with defendant at a house on a lake – without any other inappropriate activity – was information that should have been made available to defendant. The trial court's ruling:

MS. MELLOS (assistant prosecutor): So, Judge, you're finding that there was a Brady violation?

THE COURT: Yes. You know, *I can't very well do that. I cannot, because I can't find all four elements.* But I am finding that I find the first element, that this was favorable or could be favorable to the defendant. *Outcome determinative is absolute speculation on the part of this Court. I think it probably would be because I think he would be convicted of first-degree criminal sexual conduct [(CSC I)]. So, in that respect it could be outcome determinative.* But that's not, obviously, the prosecution's argument. Nonetheless, the Court sees it that way. But I cannot find improper conduct on the part of the prosecution. I do find that it existed and it should have been provided. No impropriety, but it should have been provided. So, my understanding of Brady is sufficient that I would find it a violation of Brady. [Emphasis added.]

The trial court's order contained the court's holding that a *Brady* violation occurred:

This matter having come before the Court on remand from the Court of Appeals this Court certifies after this hearing, the Care House Tape was not given to defendant, was prejudicial to his ability to prepare an adequate defense, and therefore a *Brady v Maryland* violation. This Court would certify and grant this case for a new trial based on this violation.

In general, a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice."<sup>6</sup> MCR 6.431(B); see also MCL 770.1. We review a trial court's decision to grant a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). To the extent that the trial court's decision is based on factual findings,

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<sup>6</sup> A miscarriage of justice occurs when an asserted error undermines "the reliability of the verdict." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). To determine whether an asserted error undermines the reliability of the verdict, a reviewing court must assess the alleged error "in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.*

however, we review those findings for clear error. *Cress, supra* at 691. Constitutional issues, including claims of due process violations, are reviewed de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).

Before we address the *Brady* issue raised by the parties, we first recognize that the trial court never concluded that disclosure of the videotape would “support appellate reversal of the conviction” or that the non-disclosure undermined the reliability of the verdict. MCR 6.431; MCL 770.1. Instead, the trial court at most concluded that the videotape was *more* damaging to defendant’s case, but nevertheless warranted a new trial because his trial counsel should have had it available for impeachment or other such uses. Despite this shortcoming, we will nevertheless address the *Brady* issue.

Under *Brady, supra* at 87, “the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Impeachment evidence falls within the *Brady* rule because, “if disclosed and used effectively, such evidence, ‘may make the difference between conviction and acquittal.’” *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998), quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). In *Jamison v Collins*, 291 F3d 380, 385 (CA 6, 2002), the court outlined the following test to establish a *Brady* violation:

A *Brady* violation consists of three elements, as recently set forth by *Strickler v Greene*, 527 US 263; 119 S Ct 1936, 144 L Ed 2d 286 (1999). Jamison must establish (1) that the evidence was favorable to him, (2) that it was suppressed (whether intentionally or not) by the government, and (3) that prejudice ensued. *Id.* at 281-282, 119 S Ct 1936. The prejudice (or materiality) element of a *Brady* violation is established if there is a reasonable probability of a different outcome of the trial had the *Brady* material been available. *Ibid.*

Failure to find that each of the *Brady* elements has been established precludes the finding of a *Brady* violation. See *O’Hara v Brigano*, \_\_\_ F3d \_\_\_, \_\_\_ (CA 6, 2007).

There is no dispute that the videotape was favorable to defendant, as it constituted impeachment evidence. *Bagley, supra*. Likewise, though unintentional, there is no dispute that the videotape was suppressed as defined under *Brady*. However, we conclude that defendant failed to satisfy the prejudice prong of *Brady*. The trial court’s decision itself reflects that it could not find the requisite prejudice for a *Brady* violation.<sup>7</sup> We agree with this assessment, as

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<sup>7</sup> The trial court inappropriately concluded that the prosecutor’s failure to disclose the tape was outcome determinative because disclosure of the tape would have lead to a more severe conviction. Under a *Brady* analysis, a prosecutor’s failure to disclose evidence “amounts to a violation of due process *only* if there is a reasonable probability that the jury would have returned a *different verdict* if the information had been disclosed.” *Buehl v Vaughn*, 166 F3d 163, 181 (CA 3, 1999) (emphasis added). Here defendant was charged and convicted of CSC II, and therefore, to find a *Brady* violation the trial court would have had to conclude that, in the absence of the videotape, defendant received a fair trial, i.e., “a trial resulting in a verdict worthy of  
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the videotape was not material to defendant's guilt or punishment. *O'Hara, supra*. Since materiality does not focus upon defendant's ability to prepare for trial, *United States v Bencs*, 28 F3d 555, 560 (CA 6, 1994), we must determine if there is a reasonable probability that, had the videotape been available at trial, the result of the trial could have been different. *O'Hara, supra*; *Jamison, supra*.

Here, while defendant offered evidence that the Care House interview did not follow proper protocol for interviewing children, there was no evidence to support an inference that the idea of defendant having sexual contact with the victim originated from the Care House interview. To the contrary, the evidence at trial indicated that, before the Care House interview, the victim made an accusation against defendant to her mother and provided information to an examining nurse about how she was touched. The victim's preliminary examination testimony was also available to defense counsel for use in cross-examining the victim regarding the details of her claims that the sexual contact with defendant occurred at his home on more than one occasion. Further, defendant testified on his own behalf and called his two children as witnesses to question the credibility of the victim.

Examining the record in its entirety, the victim's statements in the Care House interview may have furnished an additional basis to impeach the victim's credibility with respect to details of the claimed sexual contact, but defendant did not show that use of the victim's statements in the Care House interview would put the whole case in such a different light that it undermines confidence in the verdict that defendant was guilty of two counts of CSC II. *Strickler, supra* at 290; *Lester, supra* at 282. Indeed, the trial court did not articulate how the use of the tape during trial would have changed the outcome of the trial, or how its absence in any way cast doubt on the verdict. Therefore, even though the tape would have been favorable to defendant, evaluating the record in light of the particular charges that defendant faced at trial, the trial court abused its discretion in granting defendant's motion for a new trial based on a *Brady* violation. *O'Hara, supra*; See also, *United States v Gambino*, 59 F3d 353, 366 (CA 2, 1995) (holding that even though a transcript would have been favorable to the defendant for impeachment purposes, given that there was not a "reasonable probability that the jury would have reached a different verdict had the transcript been available" to the defendant, suppression of the transcript did not amount to a *Brady* violation). Accordingly, we reverse the trial court's order granting defendant's motion for a new trial and affirm his convictions and sentences.

Affirmed in part and reversed in part.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen  
/s/ Christopher M. Murray

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confidence.”” *Strickler, supra* at 264, quoting *Kyles v Whitley*, 514 US 419, 433; 115 S Ct 1555; 131 L Ed 2d 490 (1995).